NO. 90-89

Supreme Court, U.S.
FILED
JUL 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS
Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly ruled that a federal **agency** may remove to federal court a non-federal action brought against it in state court. 28 U.S.C. Sec. 1442 provides that an action against an **officer** is removable and there are conflicting decisions from other circuits that a suit against a government agency, as distinguished from a suit against a federal official, is not removable under this section.

2. Whether the Fifth Circuit properly ruled that the National Institutes of Health had sufficient interest in this action to remove it to federal court, based on the NIH's untested assertions of interest and without allowing the discovery ordered by the district court on this issue to proceed.

3. Whether the Fifth Circuit properly ruled that animal protection groups lacked standing to proceed with their state law claims without consideration of the nature and sources of the claims asserted.

LIST OF PARTIES

1. International Primate Protection League and Its Members - Petitioner

2. People for the Ethical Treatment of Animals and Its Members - Petitioner

3. Alex Pacheco - Petitioner

4. Louisiana in Support of Animals and Its Members - Petitioner

5. Administrators to Tulane Educational Fund - Respondent

6. National Institutes of Health - Respondent

7. Institutes for Behavior Resources, Inc. - Respondent

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The petitioners, International Primate Protection League and its Members, People for the Ethical Treatment of Animals and its Members, Alex Pacheco, and Louisiana in Support of Animals and its Members, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Fifth Circuit, entered in the above-entitled proceeding on March 8, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *International Primate Protection League v. Administrators of Tulane Educational Fund, et al*, rendered on March 8, 1990, is reported at 895 F.2d 1056, and is set forth in the Appendix at A-1 through 16.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1990. (A-1). The order denying a petition for rehearing was entered on April 13, 1990 (A-24). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). However, because the jurisdiction of the lower courts is subject to question, See Issue *I., infra*, this Court's jurisdiction (except to decide the jurisdictional question) is necessarily at issue as well. *cf., Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934).

STATUTE INVOLVED

28 U.S.C. Sec. 1442(a)(1) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them. . .
>
> > (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

This case arises out of the spirited debate surrounding the "Silver Spring Monkeys", former research animals whose release the animal protection community has sought since 1981, when the experiments to which they had been subjected were terminated for unjustifiable cruelty. The experiments had been conducted by a private research facility, the Institute for Behavioral Research ("IBR"), under a grant from the National Institutes of Health ("NIH"). Maryland police raided the laboratory, seized the monkeys, and instituted a criminal prosecution of Dr. Taub, the principal investigator conducting the experiments.[1] The monkeys were initially turned over to some of the plaintiffs for safe-keeping, and later were delivered by them to NIH, pursuant to a court order vesting temporary custody of the animals in NIH during the prosecution of Dr. Taub. Long after the order expired, NIH retained custody of the monkeys with the consent of their owners, IBR.

From the time the animals were seized, the humane community sought to insure that they would not be further abused or needlessly destroyed. Animal protection groups sued to protect the monkeys' interests under the federal Animal Welfare Act, but were found not to have standing to enforce that statute. *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986).

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1. Dr. Taub was convicted of multiple counts of animal cruelty. His convictions were later set aside because of questions concerning the applicability of the anti-cruelty statute to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 482 A. 2d 819 (1983). The Maryland legislature later amended the statute to provide clearly for application to researchers. Md. Code, Art. 27, Sec. 59 (amended 1984).

In 1986, IBR and NIH revealed they had no scientific use for the animals, present or planned; and their release seemed imminent. More than 300 members of Congress petitioned NIH to turn the Silver Spring Monkeys over to an animal sanctuary. NIH promised members of Congress that the animals would never be experimented upon, that they would be resocialized, that their crippled arms would be amputated, and that they would not even be moved without advance warning. Shortly thereafter, NIH had the monkeys secretly transferred to the Delta Regional Primate Research Center, a branch of Tulane University of Louisiana. Within a year of the monkeys' transfer, columnist Jack Anderson exposed a plan to silence the ongoing controversy by killing the monkeys after transferring title to Tulane to spare NIH political embarrassment. In the uproar following this expose, five of the primates were moved to the San Diego Zoo. This litigation involves the four surviving Silver Spring Monkeys housed at Delta.[2]

From the outset, NIH's resistance to releasing the monkeys was predicated upon its aversion to strengthening the animal protection community, whose interests were, according to the NIH, inimical to those of the scientific community. NIH had difficulty maintaining its self-proclaimed role as defender of Science, however, because the Silver Spring Monkeys, by NIH's own admission, had no scientific utility. To cure this defect in its position, NIH declared in 1988 that it had unearthed a scientific experiment for which the monkeys were uniquely suited and from which important information allegedly could be gained. In December of 1988 NIH announced its intention to

2. When the litigation began, nine Silver Spring Monkeys remained. Five have died during the pendency of the suit. Three were subjected to NIH's lethal experiment on July 6, 1990 after courts denied petitions for emergency injunctive relief. See footnote 3, *infra*.

"euthanize" three of the monkeys and perform its planned experiments immediately.

The instant action followed close on the heels of NIH's announcement. Named as defendants were NIH; IBR, the monkeys' owner; and the Administrators of the Tulane Educational Fund ("Tulane"), the monkeys' custodian. Suit was filed in state court, asserting that there was no legitimate research interest to be pursued [3], that the plaintiff animal protection groups and their members would be seriously aggrieved by the destruction of the primates, that their destruction for improper purposes constituted a public nuisance, an intentional infliction of emotional distress, and a violation of public policy, all under Louisiana law; injunctive relief was sought to prevent the animals' killing and to transfer custody to the plaintiffs or members of Congress. (See Petition A-30*ff.*).

A temporary restraining order blocking the killings was issued immediately by the state court. Relying upon 28 U.S.C. Sec. 1442(a)(1), authorizing removal of an action against a federal officer, NIH promptly removed the case to federal court, whence a second TRO issued (A-16). Plaintiffs' motion to remand was denied (A-17), and defendants' successive motions to dismiss, on grounds of *res judicata*, sovereign immunity, federal preemption, and lack of standing were also denied, (A-17, A-18). Defendants appealed from the denial of their second motion to dismiss, and the

3. An action has been filed in the district court for the District of Columbia charging NIH with scientific misconduct in connection with the planned experimentation on the Silver Spring Monkeys. The court recently declined to issue a temporary restraining order prohibiting the euthanasia of three Silver Spring Monkeys. *Physicians Committee for Responsible Medicine, et al. v. Louis D. Sullivan, Secretary of Health and Human Services, et al.* case number 90-0084 (on the docket of the United States District Court for the District of Columbia).

Fifth Circuit, holding that plaintiffs lacked standing, ordered the case dismissed.

REASONS FOR GRANTING THE WRIT

1. THE FIFTH CIRCUIT'S RULING THAT NIH, A FEDERAL AGENCY, COULD REMOVE THIS NONFEDERAL ACTION TO FEDERAL COURT EXPANDS FEDERAL JURISDICTION BEYOND THE PLAIN LANGUAGE OF THE REMOVAL STATUTE, CREATES A CONFLICT IN THE CIRCUITS, AND DOES VIOLENCE TO STATE COURT ENFORCEMENT OF STATE LAW.

A. *The Removal Statute Did Not Authorize the Exercise of Federal Jurisdiction in This Case.*

The statute upon which defendant NIH predicates its petition for removal, entitled "Federal Officers Sued Or Prosecuted", provides in relevant part as follows:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by them. . .
>
> (1) any *officer* of the United States or any agency thereof, or *person* acting under *him*, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sec. 1442 (emphasis added).

By its terms, the statute applies to suits against natural persons, not entities of the federal government. In subsection (a), the statute specifically states that an action

against any of the following listed "persons" may be removed. Further, in paragraph (1) the listed person is "any officer" of the United States or any agency thereof. The person may be an officer of the United States or of a United States agency; the right to remove is not given independently to "any agency". *See City of Alma v. Bell, Galyardt and Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985). That the statue refers to natural persons is emphasized by its statement that removal also may be accomplished by a "person acting under *him*," i.e. any officer. In *Lovell Mfg. v. Export-Import Bank of United States*, 843 F.2d 725, 733(3d Cir. 1988), the court said of this provision:

> We cannot read a statute to say what it does not say, and we think it plain from the punctuation of the sentence, and the use and placement of the word "him" that this statute merely allows removal by any officer. . . or person acting under him.

Lovell's reading, true to the statute's language, is also true to its purpose: to protect federal officers from being sued in state court for actions undertaken as part of their federal duties. As Justice Marshall explained in *Willingham v. Morgan*, 395 U.S. 402, 406-407, 89 S.Ct. 1813, 1815-1816 (1969):

> The federal officer removal statute has had a long history . . . The first such removal provision was included in an 1815 customs statute. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular.

> It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act 'under color' of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts.
>
> This provision, however, was not permanent, it was by its terms to expire at the end of the war.

While the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws[4], it was broadened to include only additional types of federal employees, not non-natural persons or entities. *Cf. Michigan v. Banning,* 88 F.Supp. 449, 450 (E.D. Mich. 1950). According to Professor Moore the 1948 revision made no change in the theory or basis for removal that the civil suit or the criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office. 1A *Moore's Federal Practice* Par. 0.164[1] at 382-384. Significantly, as stated by Moore, "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *Id. See also Lance International Inc. v. Aetna Cas. & Sur. Co.,* 264 F.Supp. 349 (S.D.N.Y. 1967); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.,* 257 F.Supp. 160 (S.D.N.Y. 1965). In addition, a proceeding that is wholly *in rem* also is not removable. *Id.* See also, *New Jersey v.*

4. Significantly, the predecessor to paragraph 1 of Sec. 1442(a) was limited to revenue officers engaged in the enforcement of the criminal or revenue laws and those acting under or by their authority. 1A Moore's Federal Practice, 0.164[1] at 380-381.

Moriarity, 268 F.Supp. 546 (D. N.J. 1967).[5]

In *Willingham v. Morgan* this Court said that the amended statute was to be broadly construed "to cover all cases where **federal officers** can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. 402, 406-407, 89 S.Ct. 1813, 1815-1816 (1969) (emphasis supplied). In broadening the statute to include the right of removal by federal agencies, where, as here, no federal officers have been sued, the Fifth Circuit has gone too far. Its interpretation is in conflict with the statutory language and with the sound reasoning of the majority of jurisdictions that have taken the position that only federal officers can remove a nonfederal action.

B. *The Fifth Circuit Has Created a Split in the Circuits.*

A split of authority has arisen in the circuits concerning the proper interpretation of Sec. 1442(a)(1). The great weight of authority, citing the clear language of the statute and its legislative history, holds that a nonfederal action may be removed only by a federal **officer**, not by a federal **agency**, and would accordingly disallow the removal by NIH in the instant case. See, *Lovell Mfg., Div. of Patterson - Erie Corp. v. Export - Import Bank of United States,* 843 F.2d 725 (3d Cir. 1988); *C. H. v. American Red Cross,* 684 F. Supp. 1018 (E.D. Mo. 1987); *W-V Enterprises, Inc. v. North Kansas Savings Ass'n,* 628 F.Supp. 1261 (D.Kan. 1986); *C.H. v. American Red Cross,* 684 F.Supp. 1018, 1023 (E.D. Mo. 1987); *Woodward v. Turnage,* 646 F.Supp. 219,

5. Plaintiffs' petition for injunctive relief to prevent the senseless killing of the Silver Spring Monkeys closely resembles an *in rem* proceeding inasmuch as the petition raises questions and issues pertaining to the custody of the animals.

221 (E.D. Mo. 1986). *Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n.* 616 F.Supp. 1504, 1509 (E.D. Wis. 1985). *Harlem River Produce Co. v. Aetna Casualty and Surety Co.*, 257 F.S. 160 (S.D. N.Y. 1960). *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985), citing *Brewer v. Department of Housing & Urban Dev.*, 508 F. Supp. 72, 74 (S.D. Ohio 1980); *Lowe v. Norfolk & Western Railroad Company*, 529 F.Supp. 491 (D. Ill.1982); *KCPO Employees Credit Union v. Mitchells*, 421 F.Supp. 1327 (D. Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D. Cal. 1973); *Lance Int'l Inc. v. Aetna Cas. & Sur. Co.*, 264 F. Supp. 349 (S.D. N.Y. 1967).

A small minority, led by the Fifth Circuit, holds that Sec. 1442(a)(1) is applicable to federal agencies. See decision below and cases cited therein; *Township of Middletown v. N/E Regional Office USPS*, 601 F.Supp. 124 (D.N.J. 1985); *Monal Construction Co. v. Brookside limited Partnership*, 539 F.Supp. 478 (W.D.D.C. 1982); *James River Apts. v. FHA*, 136 F.Supp. 241 (D.Md. 1955).

Because the majority view compels remand of actions removed by federal agencies, and because remand orders are not considered final orders reviewable by appeal, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53, 96 S.Ct. 584, 593-94 (1976); 28 U.S.C. Sec. 1291, it is not surprising that the majority view is expressed principally by district court decisions. *Lovell Mfg., supra*, the only Circuit Court decision espousing the majority view, contains a thoughtful analysis of the statute's language and history, militating in favor of its application to federal officers alone. By contrast, the Fifth Circuit, the only circuit court subscribing to the minority view, adopted its position without articulating any basis for its decision. See ruling below, (A-12); *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986); *IMFC Professional Servs. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 155-56 (5th Cir. Unit B 1982)

A writ should be granted to clarify whether 28 U.S.C. Sec. 1442(a) means what it says, and to eliminate the division among the circuits on this important jurisdictional issue.

C. *This Action Presents Issues of State Law That Are Within The Peculiar Province of Louisiana State Courts to Resolve.*

In *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), the plaintiffs, including some of the plaintiffs here, sued IBR, NIH and others in state court, seeking custody of the monkeys under Maryland law and seeking to enforce the federal Animal Welfare Act, 7 U.S.C. Secs. 2131 *et seq.* Presenting a federal question, the case was removed to federal court. The Fourth Circuit held that enforcement of the Animal Welfare Act was entrusted to the Department of Argiculture and that the plaintiffs had no standing to sue under that statue. Having thus dispensed with the plaintiffs' federal claims, the court declined to exercise pendent jurisdiction over the state law claims. Implicit in the court's ruling was its determination that 28 U.S.C. Sec. 1442(a) does not establish federal jurisdiction over any action brought against a federal agency, because NIH and the Department of Health and Human Services were defendants. As noted above, in making such a determination the Fourth Circuit was in the majority.

Anomalously, when plaintiffs reinstituted the purely state law claims the Fourth Circuit had referred to state court, NIH again removed to federal court. But because the monkeys had by then been transferred to Louisiana, plaint-

iffs filed suit in a Louisiana state court and the removal occurred within the Jurisdiction of the Fifth Circuit, one of the few in the country where such removal would be tolerated. Consequently, the claims that had been dismissed by the Fourth Circuit for want of jurisdiction were found to provide jurisdiction in the Fifth Circuit.

Plaintiffs argued below that the Fourth Circuit's ruling was *res judicata* as to the jurisdictional issue. While dismissals for lack of subject matter jurisdiction do not operate as adjudications upon the merits and thus do not preclude a second action on the same claim, at the same time, "**such dismissals do generally preclude relitigation of the underlying issue of jurisdiction.**" Wright and Miller, *Federal Practice and Procedure: Jurisdiction Sec. 4436. (emphasis supplied).* Hence, the Fourth Circuit's judgment that plaintiffs' state law claims against NIH were not cognizable in federal court "**remain[ed] effective to preclude litigation of the precise issue of jurisdiction that led to the initial dismissal**". *Id.* For example, in *Voisin's Oyster House, Inc. v. Guidry,* 799 F.2d at 188, the Fifth Circuit ruled that a dismissal on jurisdictional grounds would not bar further proceedings on the substantive claim in any court of competent jurisdiction but would preclude relitigation of the issue of federal jurisdiction. To the same effect is *Dozier v. Ford Motor Company,* 702 F.2d 1189, 1194 (D.C. Cir. 1983) (Scalia, J.), and *Stewart Sec. Corp. v. Guaranty Trust Company,* 597 F.2d 240, 241 (10th Cir. 1979) ("the principles of res judicata have been held to apply to questions of jurisdiction.")

The Fifth Circuit did not address the argument. Instead it asserted jurisdiction over state law claims that had been filed in what the Fourth Circuit had indicated was a court of competent jurisdiction. (And the Fifth circuit exercised jurisdiction for only long enough to dismiss plaintiffs' nonfederal claims, with prejudice this time, for lack of Article III standing, a requirement peculiar to the federal courts).

The Fourth Circuit's implied ruling was the correct one. The claims asserted here, grounded in Louisiana principles of public nuisance, tort, and equity, presented issues of state law. The primates at issue are privately owned and housed in a local facility. As shown below, the federal agency's interest is peripheral at best, raising further questions about the federal intrusion into this purely local matter. Moreover, as further shown below, plaintiffs would have had standing in state court to air their state court claims.

The Fifth Circuit, acting contrary to the language of the removal statute, the weight of authority and the ruling of the Fourth Circuit, exercised jurisdiction over state claims, only to dismiss those claims, which would have been cognizable under state law.

D. *The Fifth Circuit Improperly Usurped the Role of the District Court and Engaged in Fact-Finding in Ruling That NIH Had Sufficient Interest in This Action to Authorize the Exercise of Federal Jurisdiction.*

This court has admonished that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltime Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969); *Cf.* Rule 52(a) of the Federal Rules of Civil Procedure. In this case, confronted with a serious factual dispute concerning NIH's interest in this matter, unresolved by the district court, which had ordered discovery on the issue, the Fifth circuit discarded this Court's admonition in order to find, on a tenuous factual record, that NIH was a proper party. In so doing, the Fifth Circuit trenched on the authority of the district court and upheld jurisdiction under extremely questionable circumstances.

When NIH announced the decision to "euthanize" three of the Silver Spring Monkeys in December of 1988, plaintiffs filed suit immediately. They named as defendants IBR, the monkeys' owner; Tulane, their custodian; and NIH, only because NIH had claimed responsibility for the decision. From the outset, however, plaintiffs questioned NIH's role in the proceedings. When NIH removed the case to federal court, plaintiffs moved to remand, both on the ground that Sec. 1442(a)(1) is inapplicable to a suit against a federal agency, see preceding section, and on the ground that NIH had insufficient interest in the case to justify the presence of a nonfederal suit in federal court.

On the interpretation of 28 U.S.C. Sec. 1442(a) the district court felt bound to follow Fifth Circuit precedent. On the question of NIH's interest in the case, however, the district court reacted with caution and concern. Interrupting NIH's benighted argument that plaintiffs had not proven jurisdiction (which plaintiffs were challenging), the trial court observed:

> . . .I am not sure that I have jurisdiction either. The problem that has been advanced to me consistently is the failure of the plaintiffs to be permitted to discover. We don't know why the government is in this suit, quite frankly. The government intervened,[6] but there are serious questions as to whether they even should have custody of these monkeys.

6. As counsel pointed out subsequently, the NIH had not formally intervened but had been named as defendant. However, at an earlier hearing, plaintiffs' counsel had proposed dropping NIH as a defendant, to which the NIH responded that it would simply intervene. The court's reference was to that discussion.

* * *

> I have denied the plaintiffs' motion to remand because nobody has advanced a reason to this Court whether their custody has not expired by some operating agreements or whatever agreements. I just felt that this Court was put in a position to attempt to rule on these motions when nobody had advanced anything to the Court.

(Hearing, May 3, 1989, pp. 5-6).

When counsel for the NIH made an unsubstantiated claim that NIH did have an interest, the Court responded:

> **You know, you say that, but no one has shown me one document that permits that.** I mean, you know, it's sort of like working in a vacuum. The government has not given me one document. **The only documents we have ever seen have shown that the Government's interest has long expired.** Now maybe there were some subsequent documents, I have never seen those. The government has refused — I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where this Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never, to this Court.

(*Id.* at 15-16; emphasis supplied).

The court then ruled, and several times reiterated the discovery must go forward on the jurisdictional issue, the "very issue" to be placed before the Fifth Circuit on appeal and in case of remand, the "next issue before this Court." (*Id.* at 20, 25, 26, 27-28).

NIH refused to document its interest and refused to respond to plaintiffs' discovery requests relating to NIH's interest in the case, despite the firm commands of the trial judge. Instead, NIH appealed from the denial of its second motion to dismiss. (A-27). When plaintiffs noted that that was not an appealable order, NIH filed a novel pleading, styled a "motion for indicative ruling", in which it petitioned the district court to "indicate" whether it would grant a preliminary injunction if the issue were before it. At the hearing on this motion there was some question whether the court had jurisdiction to consider the bizarre request, in view of the pending appeal. However, NIH seized the opportunity to withdraw its prior consent to the extension of the TRO. It then appealed from the denial of its motion for indicative ruling, (A-29), arguing that the TRO had been converted into a preliminary injunction by the length of its duration, vesting in NIH the right to appeal from the issuance of a preliminary injunction. Contending that NIH was improperly manipulating the proceedings to secure an appeal on the merits of its procedural arguments without responding to discovery aimed at determining whether the federal courts had jurisdiction, plaintiffs filed a motion to dismiss the appeal. The motion was denied by the Fifth Circuit. (A-22).

Because of the pendency of the appeal, the district court opined that it had been stripped of jurisdiction to enforce its earlier order that discovery proceed on the issue of NIH's interest in the case. (See A-20, 23).

On appeal, then, there was nothing in the record to establish NIH's interest in the case apart from NIH's own untested assertions. Some of NIH's allegations, such as its reliance upon the expired court order for custody, have been proven false; all were highly suspicious, considering NIH's political interest in preserving the falsehood and its former disclaimers of any need or use for the monkeys.

Against this backdrop, the Fifth Circuit found as a matter of fact that "the planned euthanasia on the monkeys and accompanying research is in furtherance of NIH's statutory mission to donduct and fund biomedical research. (A-14, 15). By adverting to NIH's "statutory mission", the Fifth Circuit sidestepped the more pressing question of whether NIH has any real interest or authority in this case.[7] This was the central issue in dispute, the issue vigorously contested by plaintiffs, the issue on which the district court had made no finding, the issue on which further discovery had been ordered, and the issue on which the appellate court had no information other than NIH's self-serving and highly questionable statements. To engage in such fact-finding on such an issue, at the heart of the jurisdictional question, violated this Court's admonition that against *de novo* fact-finding. *Zenith Radio Corp. v. Hazeltime Research, Inc., supra.*

Even if 28 U.S.C. Sec. 1442(a) is read to authorize removal by a federal agency, this Court should grant certiorari to determine whether the Fifth Circuit properly determined that the NIH has sufficient interest in the case, as a matter of fact, to warrant the exercise of federal

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7. In an earlier proceeding NIH had resisted efforts to block its return of the Silver Spring Monkeys to IBR by stating that it lacked authority to retain IBR's property. (NIH Memorandum in Support of Motion to Dismiss, p. 18, *The Humane Society of the United States v. Black*, No. 81-2691 on the docket of the United States District Court for the District of Columbia.

jurisdiction.

II. THE FIFTH CIRCUIT ERRED IN FINDING THAT PLAINTIFFS LACKED STANDING.

A. *The Court Has Not Adequately addressed the Issues Presented.*

In their petition, plaintiffs asserted four separate state law claims, only one of which was addressed in the Fifth Circuit's decision. Plaintiffs' first claim, for abatement of a public nuisance; their second claim, for tortious negligence and intentional infliction of emotional distress; and their third claim for equitable relief, were overlooked by the circuit court which, relying upon the truncated listing of claims recited by defendants, reviewed only the fourth claim praying for the issuance of an injunction. In ruling that the asserted irreparable injuries were insufficient to support Article III standing, however, the circuit court did not confine its decision to the claim for injunctive relief. Instead, it ordered the entire case dismissed, including the three claims whose substance had completely escaped the court's notice. Thus, the Fifth Circuit issued a broad ruling based on an impermissibly narrow analysis, in violation of the essential rule that the existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U. S. 490, 500, 95 S.Ct. 2197, 2206(1975). Moreover, while any case in federal court must unquestionably meet Article III requirements, it was improper for the federal court to assert jurisdiction ove[illegible] nonfederal case in which local interests predominate, only to impose the more restrictive standing requirements of Article III and dismiss the action that state courts would have maintained.

Under Louisiana's liberal standing doctrine, plaintiffs would have easily cleared the standing hurdle in state court. *Cf., Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873 (La. 1981); *Garden District Property Owners Association v. City of New Orleans*, 98 So.2d 922 (Orl. App. 1957), *writs denied* (La. 1958). The Louisiana Supreme Court, in a recently published decision, has determined that mental pain and anguish sustained by a person not directly injured, becauses of the negligent infliction of injury on a third person, is actionable. *Lejeune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990). The intentional infliction of emotional distress asserted here works an even more direct injury on the plaintiffs. *Cf., Bazley v. Tortorich*, 397 So.2d 475 (La. 1981).

The Fifth Circuit analyzed the entire suit as though it were a citizen's or taxpayer's suit challenging some governmental action. Whatever the merits of that approach to the generalized assertions of the injunction and other equitable claim, see section B below, it is completely illogical to apply it to the first two counts of plaintiffs' petition which assert precise legal claims under state law. These tort and public nuisance claims are premised upon **private** disputes with defendants, rather than the sort of public interest claims that have traditionally awakened standing concerns. No other decision of which we are aware holds that the victim of a tort lacks standing to sue the tortfeasor for that wrong. However, in dismissing plaintiffs' **entire** action, including the tort claim, this is precisely what the Court ruled; and it did so without even acknowledging that the tort claim existed. To recognize and address plaintiffs' tort and public nuisance claims would be to broaden the inquiry undertaken by the court; and such broadening would necessarily vitiate the ultimate ruling of the court.

The Supreme Court explained in *Valley Forge* that the Article III requirement of injury in fact stems from a

"necessity to adjudge the legal rights of litigants in actual controversies." 454 U.S. 471, 102 S.Ct. 758. This Court emphasized its earlier pronouncement that:

> the power to declare the rights of individuals and to measure the authority of governments. . . "is legitimate only in the last resort, and as a necessity in the determination of a real, earnest and vital controversy."

Id.

This tension between the rights of individuals and the authority of governments may be central to a citizen's challenge to governmental conduct, but not to a private tort or nuisance action against private parties and the government. Defendants here recognized as much when they raised arguments of failure to state a claim under Louisiana law and Supremacy Clause protection against alleged interference with governmental action; defendants did not rely upon their standing argument alone to defeat plaintiffs' claims, and certainly not to defeat their claims against the private defendants, Tulane and IBR. Not having addressed those additional defense arguments, the Fifth Circuit offered no reasons for its dismissal of two of the claims against NIH, nor **any** of the claims against Tulane and IBR. Thus, the Court's finding with respect to standing was not "dispositive" in the sense of offering some explanation for the court's ordered dismissal of the entire action.

While plaintiffs disagree with the arguments advanced by defendants concerning plaintiffs' right of action and the Supremacy Clause, they agree that those arguments musts be reached and decided in defendants' favor in order to justify a dismissal of this action. Otherwise, there is no justification for dismissing plaintiffs' tort and public

nuisance claims against NIH and all of their claims against the other defendants.

B. *The Fifth Circuit erred in finding that plaintiffs lacked standing to maintain all their claims against NIH.*

Even in its treatment of this action as a citizens' suit against NIH, the Fifth Circuit improperly ruled that plaintiffs lacked standing. Central to the court's ruling was the finding, imported from the Fourth Circuit's decision in *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624 (1987), that "even if the defendants were to comply with the laws putatively violated, the plaintiffs would still lack any right to continue their personal relationships with the monkeys." Decision at 2577. That finding was correct in *Primate Protection* but not here. In *Primate Protection* the plaintiffs were seeking enforcement of the provisions of the Animal Welfare Act within the laboratory, and were further seeking to prevent NIH's release of the animals to IBR, neither of which remedies would have re-acquainted the plaintiffs with the animals. Here, plaintiffs are seeking custody of the animals or transfer to a sanctuary where access would be restored. Therefore, even assuming that a right of future contact is essential to a showing of injury in fact, **plaintiffs have asserted such a right.** Moreover, nothing could do greater violence to that right than the planned euthanasia of the monkeys.

Plaintiffs have demonstrated that their prior contacts with the monkeys uniquely position them to suffer injury in fact from the killings. Some plaintiffs have personally cared for these animals in the past; others, humane officers, are personally charged by Louisiana law with insuring humane treatment for these animals. The Fifth

Circuit's statement that "plaintiffs neither allege facts which demonstrate that they have any aesthetic, conservational, or environmental interests in the laboratory monkeys. . .", (A-9, 10), disregards the very plain allegations to the contrary in the petition. The court's further statement "nor [do plaintiffs] allege facts which would demonstrate that the destruction of the laboratory monkeys would impair the plaintiffs' interests in monkeys living in the wild", *Id.*, is completely beside the point. This action never purported to safeguard an allegedly endangered species, but rather to secure protection for the discrete group of animals known as the Silver Spring Monkeys, whose senseless destruction is at the heart of this controversy. The court's suggestion that concern for an endangered species might make the claims of injury more cognizable erects an artificial barrier with no foundation in standing law. Surely in *Humane Society of Rochester v. Lyng*, 633 F.Supp. 480 (W.D.N.Y. 1980), cited by the court, there was no suggestion that the animals at issue — cows — were an endangered species. Yet the plaintiffs, having shown sufficient interest in the cows' mistreatment, were permitted to maintain their action. An interest in privately owned animals may be a rarer circumstance than environmental or conservational concerns, but there is nothing in the jurisprudence to indicate that such an interest, where it exists, provides a weaker foundation for standing than an interest in wild animals.

In holding plaintiffs' interest inadequate the Fifth Circuit has analogized to *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972), in which organizational commitment to protecting the environment was found insufficient to distinguish the plaintiff's interests from the inadequate concerns of the public in general. But in *Sierra Club*, the plaintiffs failed to plead that they had used the park they sought to protect. A year after deciding *Sierra Club*, this

court held in *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405 (1973), that an environmental organization had standing to challenge federal actions allegedly causing pollution of certain parks. The only distinction between the two cases is that the *SCRAP* plaintiffs specifically pleaded that they were users of the park. This allegation, the Court found, established a personal injury instead of the generalized grievance stated by the *Sierra Club* plaintiffs. Here, as in *SCRAP*, plaintiffs have alleged personal injuries that distinguish the action from *Sierra Club* and others expressing generalized grievances. The allegations that plaintiffs have personally cared for the Silver Spring Monkeys, expending time and money in that effort with defendants' consent, have negotiated with defendants for their release, have dedicated themselves to the preservation of the animals, have developed emotional ties with them, and are prepared to accept custody demonstrate close personal ties to the animals that greatly exceed the mere abstract concern the Fifth Circuit attributes to them.

Viewing the case from another angle, reflecting the objective of the standing requirement to insure a concrete "case or controversy", see *e.g., Valley Forge, supra*, this case hardly presents an abstract question of policy. Rather than airing "generalized grievances about the conduct of government", *See, Flast v. Cohen*, 392 U.S. 83, 106 (1968), plaintiffs have alleged concrete injuries involving a specific set of facts capable of precise resolution. Precise legal and factual questions have arisen concerning defendant's need, use, and interest in the monkeys, and these questions are susceptible of judicial determination without speculation. If plaintiffs make out their case of unjustified curelty [8] to

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8. The court erroneously stated that plaintiffs rely on La. R.S. 14:102.1 for their definition of cruelty to animals. Decision at n. 4, A-8. Plaintiffs

the animals, the injury they have suffered is susceptible of concrete redress.

Plaintiffs have alleged injury in fact that is likely to be redressed by a favorable decision. Article III standing requirements have been met, and if federal jurisdiction is present, the entire case should be permitted to proceed in the trial court.

Footnote 8 continued.

referred to the criminal statute only to support their assertion of a state policy against inhumane treatment of animals. Under the civil law, enforcement of anti-cruelty laws reposes with local humane officers, La. R.S. 3:2391. In this case, jurisdiction lies with the local humane officers, who would enforce a local ordinance that **does not exempt scientific research**. Code of Ordinances of St. Tammany Parish, Section 4-16.52. In any event plaintiffs contend that defendants have no legitimate research interest in the animals.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record, as listed below, and to the Solicitor General of the United States, in accordance with Rule 29.5(b) of the Rules of the Supreme Court, by depositing same in the U.S. mail, postage prepaid, this ____ day of ____, 1990.

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APPENDIX A

INTERNATIONAL PRIMATE PROTECTION LEAGUE, et al.,
Plaintiffs-Appellees,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, and National Institute of Health, Defendants-Appellants.

No. 89-3288

United States Court of Appeals,
Fifth Circuit.

March 8, 1990.

Animal rights groups brought suit in state court seeking to bar a University and the National Institutes of Health (NIH) from euthanizing certain monkeys which had been subjected to neurological damage and from conducting subsequent autopsy research. The NIH removed to federal court and the United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., issued an injunction prohibiting disposal of the animals. Appeal was taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) animal rights groups lacked standing under Article III to maintain action; (2) dismissal of suit was required rather than remand to state court; and (3) NIH had sufficient interest in monkeys to support removal of case to federal court.

Injunction vacated and case dismissed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

In today's case we address the issue whether a preliminary injunction which prevents the National Institutes of Health from carrying out the euthanizing of three macaque monkeys in order to conduct medical research was properly granted. Having determined that the National Institutes of Health, a federal agency, has a sufficient interest in the euthanizing of the monkeys to allow it tc defend that interest in federal court, and concluding further that the plaintiffs have not alleged any injury sufficient to meet the standing requirements of Article III, we vacate the order of the district court granting the injunction and dismiss the case.

I. FACTS

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institute of Behavioral Research, Inc. ("IBR"),[1] had been conducting experiments at IBR's Silver Spring, Maryland, facility concerning the ability of macaque monkeys to recover use of a limb after nerves in it had been severed. The project had been funded by the National Institutes of Health ("NIH") and was undertaken in a pursuit of benefits for the rehabilitation of human patients suffering from neurological damage.

[1] Prior to the present suit, IBR changed its name to the Institutes for Behavior Resources.

In September of 1981, Maryland police officers executed a warrant at the facility pursuant to their investigation into the alleged mistreatment of monkeys involved in the experiments. The search resulted in the seizure of 17 macaque monkeys and the arrest and conviction of Dr. Taub on multiple counts of animal cruelty under Article 27, § 59 of the Maryland's Code.[2] Pursuant to a court order, NIH was given temporary charge of the monkeys.

Following Dr. Taub's conviction, People for the Ethical Treatment of Animals, Inc. ("PETA"), along with the International Primate Protection League ("IPPL"), the Animal Law Enforcement Association and several named individuals brought suit in Montgomery County, Maryland seeking, inter alia, "custody" of the monkeys seized from the facility. The defendants removed to the United States District Court for the District of Maryland, which dismissed the case, finding that none of the claims of the plaintiffs alleged injury sufficient to give them standing to seek possession of the animals. The dismissal was affirmed by the Fourth Circuit. *See International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S.Ct. 1624, 95 L.Ed.2d 198 (1987) [hereinafter *Primate Protection*].

Although the state court order granting temporary possession to NIH terminated in 1983, NIH has continued to act as keeper of the monkeys with the consent and

[2] Under this section, cruelty to animals is a criminal misdemeanor which carries a maximum imprisonment of ninety days and a maximum fine of $1,000 for each offense. Dr. Taub's convictions were later set aside because the Maryland statute was found not to apply to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 463 A.2d 819 (1983). The statute has since been amended to apply to researches. Md.Code, Art. 27, § 59 (amended 1984).

cooperation of IBR, the monkeys' owners. In response to public clamor and to pressure from members of Congress. NIH transfered a number of the monkeys to Tulane's Delta Regional Primate Center. In December of 1988, NIH announced that they intended to euthanize three of these animals immediately. NIH hopes to gain, through the procedure and subsequent autopsy, knowledge that may lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage.

When NIH announced its decision, the present suit was filed in Louisiana Civil District Court asserting various state law claims and seeking possession of the monkeys. The plaintiffs in this suit are IPPL, PETA, Louisiana in Support of Animals and PETA's founder, Alex Pacheco. Named as defendants are NIH, IBR and Tulane. In December of 1989, the court issued a temporary restraining order prohibiting the euthanizing of any of the monkeys.

NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. The district court continued the state court's temporary restraining order, finding the equities of the case to favor the plaintiffs. As the district court extended the temporary restraining order beyond the 20 days permitted by Rule 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1). *See Fernandez-Rogue v. Smith*, 671 F.2d 426 (5th Cir. 1982).

II. DISCUSSION

NIH contends that the district court erred in extending the TRO as the plaintiff's have no likelihood of prevailing on the merits. In support of its contention, NIH

relies upon three theories. First, NIH asserts that the plaintiffs lack standing to seek possession of the mondeys. Second, NIH alleges that the Supremacy Clause bars the plaintiffs' from interfering with the planned euthanization and subsequent autopsy. Third, NIH alleges that Louisiana Law contains no provision permitting private persons to bring civil suits to redress alleged "animal rights" violations. Finding the issue of standing dispositive, we do not address the other two contentions in defendants' brief.

A. Standing

[1] To meet standing requirements under Article III, the plaintiff must demonstrate two things: First "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); and second, a causal connection between the injury and the conduct such that the injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426, U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Supreme Court has recognized that injuries to a plaintiff's "aesthetic, conservational, and recreational interests are sufficient to meet the first requirement of Article III standing. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). The Court has likewise noted that some interests are "too abstract, or otherwise not appropriate, to be considered judicially cognizable." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984). In the present case, the plaintiffs have advanced three separate claims of injury.

1. *Personal relationships*

The plaintiffs' first claim is that:

> Plaintiffs, plaintiff organizations and individual members thereof would suffer a permanent disruption of their personal relationships with the monkeys, relationships which were established prior to any previous litigation in related matters and which continued during such litigation.

This claim of injury to the plaintiffs' "personal relationships with the monkeys" is one which, within the context of this case, is insufficient to meet Article III requirements. At the outset, we recognize that the Fourth Circuit has previously rejected the virtually identical allegation by APPL and BETA in *Primate Protection.* 799 F.2d at 938. That Court reasoned that, even if the defendants were to comply with the laws putatively violated, the plaintiffs would still lack any right to continue their personal relationships with the monkeys.

The reasoning of the Fourth Circuit in *Primate Protection,* which we adopt today, is in accord with that of the Ninth Circuit in *Animal Lovers Volunteer Ass'n v. Weinberger,* 765 F.2d 937 (9th Cir. 1985), in which the plaintiffs in that case sought to enjoin the killing of goats in a federal enclave. The court held that the plaintiffs failed to allege sufficient injury to confer standing, finding that the Government's goat control measures "would produce no "direct sensory impact' on [the plaintiff's] own environment or on any environment to which [its] member[s] would have access." *Id.* at 939. The court noted that if the plaintiff could show that the killing of the goats "would affect its members' aesthetic or ecological surroundings" that the plaintiff's position might have been different. *Id.* at 938.

The cases cited by the plaintiffs, in which courts have found animal rights groups to have met the Article III injury requirement, provide scant support to their

claim of injury. Unlike the privately-owned laboratory animals involved in the present situation, the animals in the majority of those cases were feral ones which, were the challenged conduct of the defendants to be enjoined, the members of the plaintiff organizations could freely enjoy. For example in *Japan Whaling Assoc. v. American Cetacean Soc'y,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Supreme Court held that the plaintiffs in that case had "alleged a sufficient "injury in fact' in that the whale watching the studying of their members [would] be adversely affected by continued whale harvesting." Similarly, in *Animal Welfare Institute v. Kreps,* 561 F.2d 1002 (D.C.Cir.1977), *cert. denied,* 474 U.S. 1013, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978), the court held that the plaintiffs had standing because the defendants' action "impair[ed] the ability of the members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter." Also, in *Alaska Fish & Wildlife Federation v. Dunkle,* 829 F.2d 933, 937 (9th Cir.1987), *cert. denied,* 485 U.S. 988, 108 S.Ct. 1290, 99 L.Ed.2d 501 (1988), the court held sufficient the plaintiffs' allegation that the defendants' actions would injure "those who wish to hunt, photograph, observe, or carry out scientific studies on the migratory birds." In *American Horse Protection Association v. Frizzell,* 403 F.Supp. 1206, 1214 (D.Nev.1975), the court likewise found sufficient the allegation that "[a]mong the plaintiff's individual members are persons residing in the State of Nevada and the District of Columbia and other states who have in the past and *have the right in the future* to be users and enjoyers of the lands and wildlife which is the subject of this suit."

The plaintiffs do cite one case in which an animal rights group was held to have standing to protest the treat-

ment of privately-owned animals. In *Humane Soc'y v. Lyng*, 633 F.Supp. 480 (W.D.N.Y.1980), a local humane society challenged a federal regulation requiring dairy farmers admitted to the Dairy Termination Program to hot brand their cows.[3] The court held the humane society to have standing because New York State law specifically authorized it to prosecute violations of animal cruelty laws. *Id.* at 485.

The plaintiffs maintain that among their numbers are humane officers authorized under Louisiana law to remove animals being treated cruelly. *See* La.Rev.Stat.Ann. § 3:2431, and fails to allege that any of statutory prerequisites to animal removal have been met.[4] *See Id.* at §§ 3:2432-38.

2. *Long standing, sincere commitment*

The plainfiffs' second claim of injury is that:

> Plaintiffs, plaintiff organizations and individual members thereof maintain a long-standing, sincere commitment to preventing inhumane treatment of animals, especially as concerns the monkeys now at Delta, and their

3. *See* U.S. Department of Agriculture Notice LD-248; *see also* H.R.Rep. No. 99-271(I), 99th cong, 2st Sess. 20-21, *reprinted in* 1985 U.S.Code Cong. and Admin.News 1103, 1124-25; 7 U.S.C. § 1446(d)(3).

4. We note that even if these hurdles were overcome, a finding that the euthanasia of the monkeys would constitute cruelty under § 3:2431 is unlikely. In their attempt to characterize the defendants' planned action as cruelty, the plaintiffs rely on § 14:102.1, defining criminal cruelty to animals. Although this section does hold guilty one who "[t]ortures, torments, cruelly beats or unjustifiably injures, maims, mutilates, or kills any living animal," the section contains an express exemption for scientific and medical research.

> aesthetic, conservational and environmental interests would be particularly, severely, and detrimentally affected.

The plaintiffs' "long-standing, sincere commitment" is likewise insufficient to support standing under Article III. In *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Supreme Court rejected the Sierra Club's contention that its organizational commitment to conservation was sufficient to meet the injury requirement, stating:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Id. at 739, 92 S.Ct. at 1368. Similarly, the plaintiffs' sincere commitment to the humane treatment of animals in the present case is insufficient to distinguish them from other members of the public.

The plaintiffs' claim of harm to their "aesthetic, conservational and environmental interests" fails for the same reason that their "personal relationship" claim fails. The plaintiffs neither allege facts which demonstrate that they have any aesthetic, conservational or environmental in-

terests in the laboratory monkeys, nor allege facts which would demonstrate that the destruction of the laboratory monkeys would impair the plaintiffs' interests in monkeys living in the wild. Were the plaintiffs to allege, for example, that the species of monkey here involved was endangered and that the destruction of the laboratory monkeys would therefore impair conservation efforts to preserve or restore such an endangered species to its wild habitat, their claims of injury might be more cognizable. As they have not (and likely could not credibly) make such an allegation, the plaintiffs second claim of injury is insufficient to confer standing.

3. *Advocates for the monkeys*

The plaintiffs' third claim of injury is that:

> Plaintiffs' mission as advocates for the rights of the Silver Spring Monkeys, who have no means of protecting themselves, would be severely impaired.

As discussed above, the Supreme Court in *Sierra Club* has ruled this kind of "special interest" insufficient to confer standing. Implicit in the plaintiffs' third claimed injury, however, is the contention that the plaintiffs should be allowed standing because to deny it would leave the monkeys unprotected. The Supreme Court rejected a similar contention in *Valley Forge Christian College v. Americans United for Separation of Church and State:*

> " 'The assumption that if respondents have no standing to sue, no one would have standing.' This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwiling to assume that injured parties are nonexistent simply because

> they have not joined respondents in their suit. The law of averages is not a substitute for standing."

454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982) (citation omitted). Accordingly, the mere fact that the monkeys would be left without an advocate in court does not create standing where it otherwise does not exist.

B. Removal

[2] The plaintiffs contend that even if they lack standing under Article III, they meet the requirements for standing under state law; as they allege only state law causes of action, the plaintiffs maintain, the more stringent Article III requirements need not be met. Although standing requirements in state courts are often less stringent than those of Article III, the issue lacks relevance here, as standing in federal court is determined entirely by Article III and depends in no degree on whether standing exists under state law. *Phillips Petroleum Co. v. Shotts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2970, 86 L.Ed.2d 628 (1985). This rule applies as well to cases which arrive in federal court by means of removal. *See Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 687 (8th Cir.1979).

[3] The plaintiffs urge that, if they cannot properly maintain suit in federal court, the case should be remanded to Louisiana state court. The present case was removed by NIH under the authority of 28 U.S.C. § 1442(a)(1), which permits removal by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Unlike removal under § 1441, where the discovery of a jurisdictional defect would require remand to state court, a federal defendant's right of removal under § 1442(a)(1) is absolute. *Arizona v.*

Manypenny, 451 U.S. 232, 242, 101 S.Ct. 1657, 1664, 68 L.Ed.2d 58 (1981). If a case has been removed pursuant to § 1442(a)(1), a plaintiff's lack of Article III standing requires dismissal of his claims against the federal defendant, regardless of the plaintiff's previous standing in state court. *Maine Ass'n of Interdependent Neighborhoods, Inc. v. Petit*, 644 F.Supp. 81, 84-85; *see also Maine Ass'n of Interdependent Neighborhoods, Inc. v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051, 1055 (1st Cir.1989).

The plaintiffs contend, however, that removal of the action by NIH under § 1442(a)(1) was improper. The plaintiffs urge two theories in support of their contention: First, that as NIH is a federal agency, and not a federal officer, § 1442(a)(1) is inapplicable; second, that NIH has no legally cognizable interest in the monkeys sufficient to support removal under § 1442(a)(1).

1. *Federal agencies*

[4] Although the plaintiffs concede that we have previously stated that § 1442(a)(1) applies to federal agencies, they contend that such statements were merely dicta. In *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir.1986), we held that a federal district court did not abuse its discretion by entertaining a plaintiff's state law claims because the Farmers Home Administration, a federal agency, was a defendant in the case and could have removed the case to federal court under §1442(a)(1) had it been filed in state court. *Id.* at 485. In so holding, we noted a split of authority on the issue of whether 1442(a)(1) applies to federal agencies[5] and accepted the view that it did. As we

5. *See* 14A Wright, Miller & Cooper, Federal Practice & Procedure § 3727 (2d ed. 1985).

expressly found state issues predominant in that litigation, our determination that the agency could have removed under § 1442 was crucial to our holding that the district court had jurisdiction to hear the case. *Id.*[6] The plaintiffs' attempt to characterize our holding in that case as nonauthoritative is weak at best.

2. *NIH's interest in the monkeys*

[5] The plaintiffs maintain that although they named NIH as a defendant in this action, NIH has had no interest in the monkeys following the expiration of the court order giving it temporary "custody"; if NIH has no interest, the plaintiffs contend, then removal under § 1442 was improper.

The plaintiffs fail to recognize that "the only prerequisite to removal of a civil action under § 1442 is that it be *brought against* a federal officer or agency." *IMFC Professional Servs. v. Latin Am. Home Health, Inc.*, 676 f.2d 152 (5th Cir. Unit B 1982). As NIH is named as a defendant in the present action, the case was properly removed.

Although we find the case to have been properly removed, we recognize that if NIH indeed has no interest whatsoever in the monkeys, the dismissal of NIH from the suit would require remand, rather than dismissal, of the plaintiffs' suit against Tulane and IBR. *Cf. IMFC*, 676 F.2d at 158-59; *Williams v. City of Atlanta*, 794 F.2d 624, (11th Cir.1986). The issue here then is whether NIH's possessory, financial and research interests in the monkeys are sufficient to allow it the right to protect those interests

6. *See also IMFC Professional Servs. v. Latin Am. Home Health Inc.*, 676 F.2d 152, 155-56 (5th Cir. Unit B 1982).

in federal court.

In enacting 28 U.S.C. § 1442, Congress recognized that

> federal officers are entitled to, and the interest of national supremacy requires, the protection of a federal forum in those actions commemced in state court that could arrest, restrict, impair, or interfere with the exercise of federal authority by federal officials.

Murray v. Murray, 621 F.2d 103, 106 (5th Cir.1980). In *Murray*, the United States was named as a Garnishee in a state court lawsuit by a woman against her ex-husband seeking her husband's Veterans' Administration benefits in satisfaction of unpaid alimony. The government removed under § 1442(a)(1) to federal district court, which denied Mrs. Murray relief on summary judgment. We reversed the judgment of the district court for want of jurisdiction, reasoning that the United States was a "mere stakeholder" in the action. We held that because the government was unable to identify how the disposition of the garnishment action in state court could "arrest, restrict, impair, or interfere with the actions of a federal official or the operations of the federal government," the action fell beyond the scope of protection afforded by § 1442(a)(1). *Id.* at 107.

In the present case, NIH has demonstrated that its interest goes beyond that of "mere stakeholder." HIH funded IBR's original experimentation on the monkeys and, with the owner's consent, serves as the monkeys' keeper. More important, however, is that the planned euthanasia on the monkeys and accompanying research is furtherance of NIH's statutory mission to conduct and

and fund biomedical research. Because the injunctive relief sought by the plaintiffs could interfere with NIH's operations, it is entitled to protect its legitimate interests in a federal forum. As federal court jurisdiction is limited by the constitution, the plaintiffs' failure to allege injury sufficient to satisfy Article III standing requirements is fatal to their suit. Accordingly, we VACATE the order of the district court granting the preliminary injunction and DISMISS the case.

APPENDIX B

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

United States District Court
Eastern District of Louisiana

TEMPORARY RESTRAINING ORDER

Considering the verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Spring Monkeys.."

This order to remain in effect through midnight, February 1, 1989, unless otherwise terminated.

THUS DONE AND SIGNED this 6th day of January, 1989, New Orleans, Louisiana.

/s/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

WEDNESDAY, FEBRUARY 1, 1989
10:00 A.M.

MOTION OF PLAINTIFFS TO REMAND.

DENIED

MOTION OF NAT'L INSTITUTE OF HEALTH TO DISMISS.

DENIED. without prejudice to be reset by the movers.

DATE OF ENTRY FEB 2 1989.

APPENDIX D

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund et al.

United States District Court
Eastern Distsrict of Louisiana

WEDNESDAY, April 12, 1989

10:00 A.M.

MOTION OF THE UNITED STATES OF AMERICA TO DISMISS.

ARGUED

DENIED AT THIS TIME.

APPENDIX E

International Primate Protection League, et al.

v.

Administrators of the Tulane Educational Fund, et al.

United States District Court
Eastern District of Louisiana

WEDNESDAY, MAY 3, 1989

10:00 A.M.

MOTION OF THE UNITED STATES FOR STAY, PENDING APPEAL.

MOTION ARGUED. MOTION DENIED INSOFAR AS TO THE JURISDICTION ISSUE; GRANTED AS TO ALL OTHER ISSUES.

MOTION OF THE UNITED STATES FOR INDICATIVE RULING.

ARGUED DENIED. . T.R.O. NOT DISSOLVED AT THIS TIME.

DATE OF ENTRY MAY 4 1989

APPENDIX F

MINUTE ENTRY
WYNNE, M.
August 16, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL. CIVIL ACTION

VERSUS NUMBER:88-5713

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL. SECTION "L" (2)

FILED AUG 17 89

HEARING ON MOTION

APPEARANCES:

MOTION: of the plaintiffs

(1) Motion to Compel

(2)

(3)

— :

1 : Opposition

ORDERED

1 : DENIED The motion is denied because this

Court is divested of jurisdiction over matters involved in the appeal pending before the Fifth Circuit Court of Appeals. Plaintiffs are seeking discovery on the issues which are presently pending before the Fifth Circuit. Newball v. Offshore Logistics International, 803 F.2nd 821 (C.A. 5 1986), United States v. Hitchmon, 602 F. 2nd 689, (C.A. 5 Cir. 1979, en banc)

MICHAELLE PITARD WYNNE
United States Magistrate

CLERK TO NOTIFY ALL COUNSEL

DATE OF ENTRY AUG 17 1989

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-3288

FILED AUG 9 1989

INTERNATIONAL PRIMATE PROTECTION ET AL.,
Plaintiffs-Appellees

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee(s) to dismiss the appeal is DENIED. There is no showing of consent to extend the temporary restraining order beyond February 1, 1989 - certainly not beyond April 12, 1989. See *Fernandez-Rogue v. Smith* 671 F.2d 426, 429 (5th Cir. 1982).

APPENDIX H

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL.

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND ET AL.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

WEDNESDAY, SEPTEMBER 13, 1989
10:00 A.M.

MOTION OF PLAINTIFFS INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ETC. TO REVIEW MAGISTRATE'S ORDER DENYING MOTION TO COMPEL.

ARGUED. COURT UPHOLDS THE MAGISTRATE.
MOTION TO CERTIFY.
DENIED

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3288

FILED APR 13 1990

INTERNATIONAL PRIMATE PROTECTION, ET AL.,
Plaintiff-Appellees,

versus

ADMINISTRATORS OF TULANE ED. FUND
and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(APRIL 13, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3288

FILED MAY 2 1990

INTERNATIONAL PRIMATE PROTECTION, ET AL.,
Plaintiffs-Appellees,

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND and NATIONAL INSTITUTES OF HEALTH,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

---

O R D E R :

☒ The motion of *appellees* for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ Thomas Gibbs Gee
UNITED STATES CIRCUIT JUDGE
THOMAS GIBBS GEE

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
v.	*	SECTION: "L" (2)
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	
	* *	

NOTICE OF APPEAL

The United States of America, on behalf of its agency the National Institutes of Health, hereby appeals to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §1292(a), from the order entered on April 12, 1989.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street, Room 205
New Orleans, LA 70130
Telephone: (504) 589-3561
LA Bar Roll No.: 5683

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this 17 day of April, 1989.

/s/ R M Force

Assistant U. S. Attorney

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	CIVIL ACTION
versus	NO. 88-5713
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	SECTION L (2)

NOTICE OF APPEAL

The United States of America, on behalf of its agency the National Institutes of Health, hereby appeals to the United States Court of Appeals for the Fifth Circuit the decision of the District Court on May 3, 1989, on the Motion of the United States for an Indicative Ruling.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE -5683
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street
New Orleans, Louisiana 70130
Telephone: (504) 589-3561

APPENDIX M

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. **DIVISION " "** **DOCKET NO.**

FILED Dec 28

INTERNATIONAL PRIMATE
PROTECTION LEAGUE, ET AL

versus

ADMINISTRATORS OF THE TULANE
EDUCATIONAL FUND, ET AL

FILED: _____ _____
DY. CLERK

PETITION FOR DECLARATORY
AND/OR INJUNCTIVE RELIEF

The petition of International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, respectfully represents:

I.

Made defendants herein are the Administrators of the Tulane Educational fund, the National Institutes of Health (NIH) and the Institutes for Behavior Resources, Inc. (IBR).

II.

Plaintiffs, International Primate Protection League (IPPL), People for the Ethical Treatment of Animals (PETA), and Louisiana in Support of Animals ( ), are private organizations for the humane treatment of animals, with their main offices in South Carolina, Maryland, and Louisiana respectively. Plaintiff Alex Pacheco is founder and chairman of PETA and is domiciled in Maryland.

III.

Defendant the Administrators of the Tulane Educational Fund (Tulane) is a corporate body established by the statutory law of Louisiana and based in New Orleans, Louisiana. It governs the Tulane Medical Center, one branch of which is the Delta Regional Primate Research Center.

IV.

Defendant National Institutes of Health is a federal agency in the Department of Health and Human Services, whose main office is in Maryland, and which is doing business in Louisiana.

V.

Defendant Institutes for Behavior Resources, Inc. is a private research corporation in the District of Columbia, which claims (contested) ownership of certain monkeys that are being housed in Louisiana.

VI.

Plaintiffs seek to enjoin defendants and any of their

agents, officers, representatives, employees and/or all those persons in concert with them from destroying or otherwise disposing of or injuring any of the surviving primates known as the "Silver Spring Monkeys", and further seeks judgment declaring that plaintiffs or members of the U.S. Congress be made custodian of those monkeys.

VII.

In May, 1981, plaintiff Alex Pacheco was hired by Edward Taub, PhD, head of the IBR's warehouse laboratory, to assist in primate experiments. In particular, IBR was conducting experiments on a number of macaque monkeys, highly intelligent and social animals. The experiments, conducted pursuant to a grant funded by the NIH, involved severing spinal nerves and observing the animals' capacity to learn to use their limbs. The survivors of such experimentation have come to be known as "the Silver Spring Monkeys."

VIII.

In the course of his employment, Mr. Pacheco discovered the Silver Spring Monkeys were receiving inadequate care, and that the experiments were needlessly repetitive and cruel. The monkeys showed signs of extreme distress. During the course of and as a result of faulty experimentation and neglect, many of the monkeys had not only suffered crippled limbs, but also had torn or bitten off their own fingers and performed other acts of self-multilation; they had inflicted wounds on monkeys in adjoining cages; bones protruded through their flesh; muscle tissue was exposed; the cages housing the animals were tiny, rusted, broken and filthy; no one had properly bandaged the animals and no veterinarian was ever used; and the animals' feeding was neglected, resulting in their going

without food for days or eating food contaminated by fecal matter.

IX.

As a consequence of his treatment of the animals, Dr. Taub was charged with seventeen criminal violations. Pending those proceedings, the police and plaintiffs herein PETA and Pacheco took temporary custody of the Silver Spring Monkeys; the Circuit Court for Montgomery County later ordered them transferred to NIH facilities in Poolesville, Maryland. At that facility, the monkeys were kept in isolation and provided no rehabilitation. Years later, the monkeys were transferred by NIH, custodians of the monkeys, to the Delta Regional Primate Research Center, a component of Tulane University in New Orleans, Louisiana.

X.

Defendants herein IBR and NIH represented orally and in writing to plaintiffs, to the public, and to the United States Congress that: 1) corrective surgery (amputation) to crippled limbs of the animals would be carried out; 2) the animals would be resocialized; 3) no invasive research would take place; and 4) the animals would not be killed but allowed to live out their natural lives.

XI.

In spite of their assurances and in complete violation of their commitments to the plaintiffs, to the public and to the U. S. Congress, defendants have made an express determination to exterminate the monkeys.

XII.

On information and belief, the extermination of at least three Silver Spring Monkeys is imminent.

XIII.

Plaintiffs have offered since 1981 to house, maintain and resocialize the Silver Spring Monkeys at Primarily Primates, a refuge specifically established for the care of abused primates, in San Antonio, Texas. Over two hundred members of Congress have signed a resolution stating that this refuge is the most appropriate facility for resocialization of the monkeys, and still more have written letters requesting that the animals be transferred to that facility. As an alternative, Moorpark College in California has offered to care for the monkeys, which offer is also supported by many members of Congress and by plaintiffs.

XIV.

Defendants have refused to transfer the monkeys to either facility and they have: 1) not performed the needed corrective (amputation) surgery, and 2) not resocialized the animals.

XV.

Veterinarians who have viewed these monkeys have expressed their opinions that euthanasia is not warranted by the facts of this case, and that the monkeys could live out their natural lives safely, humanely and comfortably if transferred to a suitable facility.

XVI.

A number of respected scientists have also opined

that the past abusive, inhumane and unscientific treatment of the Silver Spring Monkeys would invalidate any further research or experimentation on the animals. IBR and NIH have previously expressed their disinterest in conducting any further research or experimentation on these animals, and neither Tulane nor Delta has expressed any desire or intention to use them in connection with any research or experimentation.

COUNT I

XVIII.

Louisiana has a strong public policy against inhumane treatment of animals. That policy is expressed in La. R.S. 14:102.1, which includes as an "offense affecting the public sensibility" the unjustified killing of animals. Title 3 of the Louisiana Revised Statutes at Sections 2431 et seq., and 2391 et seq. also further the state's policy interest in humane treatment of animals, including proper care and avoidance of unjustified euthanasia.

XVIII.

Defendants' 1) refusal to transfer the monkeys, 2) their decision to exterminate some of the animals, 3) their decision to deprive the animals of needed surgery and 4) their decision to continue to confine and isolate the animals and deprive them of resocialization, are in violation of Louisiana's public policy against inhumane treatment of animals and constitute a public nuisance.

COUNT II

XIX

Defendants above-listed conduct has caused extreme

emotional distress to plaintiff organizations and their members, whose mission is to avoid and prevent such inhumane treatment of animals. Members of plaintiff organizations, including plaintiff Alex Pacheco, have had personal contact with the Silver Spring Monkeys and have developed longstanding relationships marked by deep affection for the animals. Their present treatment and defendants' proposed killing of three of the animals has caused plaintiffs mental anguish and does violence to the missions of the plaintiff organizations.

XX.

Defendants' negligent treatment of the Silver Springs Monkeys and their intentional infliction of emotional distress and mental anguish on plaintiffs are violative of La. C.C. Art. 2315.

COUNT III.

XXI.

Plaintiffs seek an order transferring custody of the Silver Spring Monkeys from defendants, who have no further need, use, or concern for them, to either plaintiffs or members of Congress who have expressed willingness to assume such custody.

XXII.

On information and belief, the Silver Spring Monkeys are financial burdens to IBR rather than a financial asset, because the monkeys are not the subjects of any present experimentation, yet the annual expense of housing them is approximately $30,000.00 apiece.

XXIII.

Legal remedies are inadequate to safeguard the plaintiffs' rights.

XXIV.

Article 4 of the Louisiana Civil Code provides that "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity." In this case, the highly intelligent and socialized nature of the Silver Spring Monkeys, Louisiana's public policy of humane treatment to animals, plaintiffs' profound concern for the monkeys, and defendants' disregard for and cruelty towards them dictate that the only just and equitable solution is transfer of their custody to plaintiffs or members of Congress.

COUNT IV.

XXV.

If defendants are not enjoined and restrained from continuing to cruelly confine and deprive the animals of needed surgery and from killing the monkeys plaintiffs will suffer irreparable harm and loss in that:

a. Plaintiffs, plaintiff organizations and individual members thereof would suffer a permanent disruption of their personal relationships with the monkeys, relationships which were established prior to any previous litigation in related matters and which continued during such litigation.

b. Plaintiffs, plaintiff organizations and individual members thereof maintain a long-standing, sincere commit-

ment to preventing inhumane treatment of animals, especially as concerns the monkeys now at Delta, and their aesthetic, conservational and environmental interests would be particularly, severely and detrimentally affected.

c. Plaintiffs' mission as advocates for the right of the Silver Spring Monkeys, who have no means of protecting themselves, would be severely impaired.

XXVII.

If defendants are restrained from cruelly confining and killing the monkeys, their only burden will be to uphold state statutes requiring humane treatment of animals.

XXVIII.

There are no adequate pecuniary standards for the measurement of damages which have been and would be sustained by the plaintiffs, who have suffered as a result of the treatment of these animals and will suffer even more if the defendants are not prohibited from needlessly killing the monkeys.

WHEREFORE, plaintiffs pray that this Court:

A. Immediately grant a temporary restraining order enjoining the defendants from in any way cruelly confining and destroying the Silver Spring Monkeys during the pendency of this proceeding;

B. Grant a preliminary injunction to the same effect as paragraph A;

C. Grant a permanent injunction enjoining the above-described conduct;

D. Order that custody of the monkeys be given to the plaintiffs or to members of the U. S. Congress; and

E. Grant whatever additional relief may be dictated by law and equity together with costs and attorneys fees.

Respectfully Submitted,

/s/ Margaret E. Woodward
BAR No. 13677
610 POYDRAS ST., SUITE 318
NEW ORLEANS, LA 70130
PHONE: 504-525-9538
ATTORNEY FOR PETA

PLEASE SERVE:

1. ADMINISTRATORS OF TULANE EDUCATIONAL FUND
   Through Ron Mason or Clarence Sheps
   6823 St. Charles Avenue
   New Orleans, LA 70118

2. INSTITUTE FOR BEHAVIORAL RESOURCES

   (Please Hold Service)

3. NATIONAL INSTITUTES OF HEALTH

   (Please Hold Service)

VERIFICATION

I, Alex Pacheco have read the foregoing Petition for Declaratory and/or Injunctive Relief and duly swear that all allegations contained therein are true to the best of my knowledge and belief.

Washington, D.C., this 28th day of December, 1988.

/s/ Alex Pacheco